

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

STATE OF OREGON,)
)
Plaintiff,) Washington County
) Circuit Court
v.) No. 16CR46339
)
BENJAMIN JAY BARBER,) CA A163786
)
Defendant.) **Volume 1 of 5**

TRANSCRIPT OF PROCEEDINGS ON APPEAL

BE IT REMEMBERED that the above-entitled
Court and cause came on regularly for hearing before
the Honorable Suzanne M. Upton, on Tuesday, the 9th
day of August, 2016, at the Washington County
Courthouse, Courtroom No. LEC, Hillsboro, Oregon.

APPEARANCES

Marie Atwood, Deputy District Attorney,
Appearing on behalf of the State;

Cameron Taylor, Attorney at Law,
Appearing on behalf of Defendant Barber.

ALSO PRESENT

Melanie Kebler, Attorney at Law.

KATIE BRADFORD, CSR 90-0148
Court Reporter
(503) 267-5112

Proceedings recorded by digital audio recording;
transcript provided by Certified Shorthand Reporter.

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1 (Volume 1, Tuesday, August 9th, 2016, 1:44 p.m.)

2 P R O C E E D I N G S

3 (Whereupon, the following proceedings
4 were held in open court:)

5 THE CLERK: We're on the record.

6 THE COURT: Go ahead.

7 MS. ATWOOD: Okay. So this is State
8 v. Benjamin Jay Barber, 16CR46339. We're here for a
9 hearing on defendant's motion for release.

10 The State filed a response this morning
11 that I also believe the release office forwarded to
12 Your Honor. If you need another physical copy, I
13 have one here.

14 THE COURT: No, I've got it.

15 And so then, Mr. Taylor, did you get a
16 copy of the release report and the statement from the
17 victim and the State's response?

18 MR. TAYLOR: I did, Judge.

19 THE CLERK: It's in here, Judge. I
20 don't think -- Mr. Barber is not (indiscernible).
21 There we go. Sorry.

22 (Defendant Barber enters the courtroom.)

23 THE COURT: Okay. So we're calling the
24 State of Oregon versus Benjamin Jay Barber.

25 Hi, there. Come on up, Benjamin Barber.

1 DEFENDANT BARBER: Yes, ma'am.

2 THE COURT: Okay. And the case number
3 is 16CR46339. This gentleman is in custody. He's
4 with counsel, Cam Taylor, who's just told me that
5 he's received all these documents.

6 And, Ms. Atwood, did you receive the
7 release officer's report?

8 MS. ATWOOD: I did, Judge.

9 THE COURT: Okay. So it's -- it's your
10 motion and I'd be glad to hear from you further if
11 you wish, Mr. Taylor.

12 MR. TAYLOR: Yes, Judge. So I provided
13 the Court with a motion and an affidavit which
14 outlines sort of a basic plan.

15 I'd like to talk about a few things,
16 primarily starting with what has changed since my
17 client was released on his own recognizance because,
18 as Your Honor is aware, Mr. Barber was originally
19 arrested, booked and released on his own
20 recognizance.

21 THE COURT: Right.

22 MR. TAYLOR: He was given an arraignment
23 date. The situation appears to be that when he was
24 in custody for a day or so, he was told that his
25 arraignment would be at 8:15 -- or at 3:00 in the

1 afternoon on the standard out-of-custody arraignment
2 docket.

3 He then was released, his arraignment
4 got moved to the out-of-custody morning docket. He
5 misunderstood that and he appeared on the correct day
6 of his arraignment, but at 3:00 p.m.

7 So I think that's an important fact to
8 know in this case, Judge, because, while, yes, he got
9 the time wrong, it shows that he was clearly not
10 intending to run off or avoid court or anything like
11 that. For that matter, his bike is apparently still
12 locked up out in front of the jail. He would very
13 much like to retrieve it.

14 So that is the main thing that has
15 factually changed in this case since he was recogged.
16 What I want to talk about is our release plan, Judge.
17 What we are asking the Court to do is release
18 Mr. Barber back to his own apartment.

19 He resides at an apartment here in
20 Hillsboro. The address is 176 Northeast Jackson
21 Street. It's a little two-story apartment complex
22 not far from here.

23 The other part of our release plan is
24 that this morning I -- I spoke to his mother whose
25 name is Jane Cortez. She lives in Oregon City and I

1 kind of filled her in on what's going on and I
2 provided all of her information to the Court. She
3 has agreed that if Mr. Barber is released, she will
4 keep in contact with him.

5 She will help make sure that he appears
6 for all his court dates and make sure that there
7 aren't any problems on release. For what it's worth,
8 she also says she's going to drag him to church every
9 Sunday.

10 So she is going to be involved in his
11 life and make sure that they're aren't any more
12 Failures to Appears, but I don't believe that there
13 will be.

14 I have spent already a great deal of
15 time talking to Mr. Barber about his case. He is
16 very anxious to be involved with this case. He's
17 very committed to this case. I expect he will be in
18 excellent contact with me if he's released. And he
19 does intend to appear for all dates and to litigate
20 this case.

21 You know, Judge, I want to address some
22 of the things the district attorney mentioned in her
23 motion and sort of talk about the release criteria.
24 First off, Judge, the issue of protection of the
25 victim. You're aware of what this charge is and

1 basically what it amounts to.

2 It is a distribution of images on the
3 internet type of charge, so it's not a physically
4 violent charge of any kind. There are no allegations
5 of any sort of, you know, physical presence or
6 physical threats or anything of that nature. So the
7 physical safety of the victim, I don't believe, is an
8 issue.

9 I also don't believe there's any
10 indication that anyone else is in any sort of danger
11 or anything like that in this case. Again, these are
12 misdemeanor charges. Yes, there are nine counts.
13 But as it stands, they are nonviolent misdemeanor
14 charges and I think that's important to consider
15 under release criteria.

16 His criminal history, also important as
17 noted in the release report, he has an old Furnishing
18 charge that was reduced to a violation, a Harassment
19 that was not complained and a Criminal Trespass that
20 is currently in community court in Multnomah County.

21 I guess the main thing I'll focus on is
22 the Harassment. It's a Harassment you will be told
23 does involve the same complainant. And, Judge, the
24 issue is that my client and the alleged victim in
25 this case were previously married.

1 They apparently had a very messy divorce
2 in 2013, one of those cases where there were
3 definitely restraining orders flying in both
4 directions as well as both parties being arrested for
5 Harassment once. No charges came out of either of
6 those.

7 That issue has obviously resolved. They
8 no longer reside together. They certainly have no
9 desire to be together or get back together or
10 anything like that. As far as some of the other
11 things the DA mentions, the DA talks about employment
12 and homelessness as being issues for why we should
13 not release my client.

14 What I can tell the Court is this: My
15 client is currently employed at Intel. He is a cloud
16 engineer. I spoke to his employer yesterday. He is
17 still currently employed as of today. If he gets
18 released and goes to work tomorrow, he has a good
19 chance of continuing to be employed.

20 So if avoiding unemployment is an issue,
21 then the best thing to do would be to release him so
22 that he can salvage his job. And, again, as far as
23 homelessness, same argument. If he is released he
24 can go back to work, he can continue to make money.
25 He can keep his house. He will not become homeless

1 again.

2 Family relationships, I discussed that
3 as well as current residence and third-party issue
4 with his mom. The other thing I guess want to
5 mention at this point, there's been talk between the
6 release officer and the DA about, if he's released,
7 a -- an issue on internet use, since these are crimes
8 that arise from internet use.

9 The basic argument we would put forward
10 there is that, as far as the condition goes, we would
11 ask that he be allowed -- and that's what the DA is
12 asking for in their motion -- no internet use except
13 for work purposes that I mentioned. He is a software
14 engineer.

15 So we would be asking that he be allowed
16 to use the internet and internet devices at work
17 solely for employment. What I can tell the Court
18 there is that Intel obviously monitors their internet
19 usage. So if he's using a computer at work, it is
20 only going to be for work purposes.

21 We have no objection or any problems
22 with prohibitions on social media or personal
23 internet use. I think the other thing to consider
24 there is that if he did anything in the future, he
25 would be exposing himself to additional criminal

1 liability. So that's a consideration in that regard.

2 We also do not object to the -- the
3 district attorney's request for no contact with the
4 complainant's current boyfriend. We don't object to
5 that at all. So we'd be fine with those types of
6 release conditions. So that's what I'll start out
7 with, Judge, and throw it to the DA.

8 THE COURT: Thank you, Mr. Taylor.

9 Ms. Atwood, go ahead.

10 MS. ATWOOD: Thank you, Judge. So I've
11 had a chance to review the Release Office's report.
12 And I've also had a chance to speak with defense
13 counsel today. And there's a couple of things that
14 have come to light since I filed my memorandum in
15 response to the defense motion.

16 It does appear that although, there have
17 been, I guess, a few different addresses that the
18 defendant has stated that he lives at in the records
19 that we were able to find, the one that we had most
20 recently gotten from him on his initial release
21 agreement -- the reason for the State's concern
22 primarily was that the address as it was listed on
23 that document was not -- when you looked for it on
24 the internet, was not coming up to a physical
25 residence.

1 So that was part of -- of my concern,
2 was that the defendant wasn't being, I guess, direct
3 enough about where it was he was residing.

4 Secondly, the -- I guess the most
5 important things at this point for the State are the
6 victim's protection, primarily and just the nature of
7 the charges in this case and the ability of the State
8 to pursue additional investigation and preserve as
9 much evidence as possible.

10 I mean, this is an unusual type of case
11 in that the charges are -- involve the use of the
12 internet and computers and social media and
13 electronic evidence that the defendant, if he were to
14 remain out of custody, could delete.

15 He could go online to his various
16 accounts that he was using to post these photographs
17 and videos and try and hide evidence. The defendant
18 could, on the other hand, continue disseminating
19 information about the victim and images and videos of
20 the victim unlawfully.

21 So that is a huge primary concern of the
22 State in this case 'cause we do still have ongoing
23 investigation to try and get our hands around what
24 the full scope of defendant's actions were.

25 Secondly, regarding the protection of

1 the victim, the Court has the letter, the -- the --
2 the written statement that the victim prepared in
3 anticipation of today's hearing where she details the
4 fact that not only has he continued to purchase
5 domain names online using her name, he's e-mailed to
6 her at work these images of herself, you know,
7 creating a serious risk for her livelihood and her
8 well being during the course of the investigation in
9 this case.

10 So it's not that as soon as the
11 defendant was aware that he was being investigated or
12 searched for police that he stopped these actions.
13 He continued to contact the victim and continued to
14 disseminate things about her online.

15 And, additionally, the reason that the
16 State would have asked for the no-contact condition
17 with Micah Goldstein (phonetic), the victim's
18 boyfriend, is because he's also become a target of
19 the defendant's communications and actions in this
20 case.

21 So I think the victim protection and the
22 nature of the case being a primary -- part of the
23 primary release criteria should, I guess, be at the
24 forefront of the Court's mind when making a release
25 decision today more so than whether or not the

1 defendant is currently employed.

2 It's a good thing that the defendant's
3 currently employed, but the fact that his employment
4 is so intertwined with internet usage and computer
5 usage, I think, creates an unnecessary risk that the
6 victim shouldn't have to be dealing with at this
7 point.

8 So unless you have any other questions
9 for me, the victim's attorney is here today and would
10 like to be heard on the record regarding the motion.
11 The victim is not able to be here today herself.

12 THE COURT: Thank you very much.

13 Counsel, I'd be glad to hear from you.

14 MS. KEBLER: Absolutely.

15 Melanie Kebler, Your Honor, for the victim, 083798.
16 And we agree with the position of the State. My
17 client, as she detailed a little bit in her letter,
18 has experienced a lot of emotional and some physical
19 abuse from this defendant in the past.

20 And what I think worries her the most
21 are the statements that he has made and then followed
22 through on about ruining her life. I can tell you
23 the divorce was messy because he wanted it to be
24 messy. He dragged it out as long as he could.

25 And he is simply not accepting and

1 not -- and not happy that she has ended the
2 relationship. And that's been a pattern of the
3 communications even over the past six months. I will
4 let you know that she has tried to say, "Stop
5 contacting me. Don't send me e-mails." You know,
6 "Let it go."

7 And that's been going on for months
8 before this report was even made. So there are some
9 serious concerns about whether or not he'd be able to
10 follow a no-contact order. My client has mental
11 health concerns for defendant. And I don't know if
12 defense attorney can speak to that.

13 THE COURT: Your client has concerns
14 about his mental health --

15 MS. KEBLER: Yes.

16 THE COURT: -- right? Right.

17 MS. KEBLER: Yes.

18 THE COURT: That's what I thought.

19 MS. KEBLER: So -- so, Your Honor, we do
20 oppose release on the same, you know, basis the State
21 outlined. And if you are considering release, I
22 think my client would be much more comfortable if he
23 is released to a third party, so not living on his
24 own, but living with a family member, mom.

25 Oregon City is far away from here. The

1 victim lives in this area as well. And that would be
2 someone that could actually say, "Yeah. He's not
3 using internet or social media while he's at home,"
4 if that's a condition that Your Honor imposes.

5 So I would encourage, if there is a
6 release today, that there be very, very strict
7 release conditions, just given his behavior in the
8 past and his inability to leave my client alone.

9 THE COURT: Thank you very much.

10 MS. ATWOOD: Yes.

11 THE COURT: Back to you, Mr. Taylor.

12 MR. TAYLOR: Thank you, Judge. Brief
13 response that I guess will let him address most of
14 the concerns raised by the DA and counsel.

15 I have had what Judge Sims would refer
16 to as the woodshed talk with my client and explained
17 to him that, should the Court allow his release,
18 there's going to be conditions of no contact with
19 anyone involved and absolutely nothing on the
20 internet that could be construed anything of the type
21 or messing with evidence or anything of that nature.

22 And I've explained that there is, for
23 lack of a better word, a circle of things that that
24 encompasses, right? A circle of prohibitions. And
25 then much wider than that is there a circle of things

1 that might be construed in that light and that he
2 will do absolutely nothing to get even close to that
3 outer circle of things that could possibly ever raise
4 any concerns.

5 So what I guess I'm getting at is that
6 I've had a very serious talk with my client about
7 how, if released, there will be no contact of any
8 kind. There will be no messing around on the
9 internet, nothing like that. And he has indicated
10 that he understands that. He accepts it.

11 All he wants to do is sleep in his own
12 bed and go to work. That's what we have for you,
13 Judge.

14 THE COURT: Thank you.

15 Mr. Barber, I'm not going to do what
16 your attorney's asked. You've got a good lawyer and
17 I hope you will continue to follow his advice. I
18 don't want you to misunderstand that this is some
19 flukey thing that, quote, "Just because you failed to
20 appear, now all of this is falling on your head."

21 Because let's back up and just say,
22 "Okay. If you hadn't failed to appear and just on
23 your own came back to court on the next court date,
24 you would have then been charged the remaining" -- I
25 think it's seven more counts; is that right, or eight

1 more counts?

2 MS. ATWOOD: Eight.

3 THE COURT: And so then you would have
4 had to been booked on it. And then I would probably
5 have heard this same information from the victim.
6 And then I would I say what I'm going to say today,
7 is I'm going to raise the security.

8 I'm really concerned about you. This is
9 dangerous. It is weird. It is creepy. Here's the
10 thing is congratulations that you haven't physically
11 harmed her terribly, but the kind of harm you can do
12 to somebody by doing the stuff that you have done can
13 be lifelong lasting, putting these kind of images.

14 And we all know that you can't
15 necessarily take stuff down, take stuff off even if
16 you appear to. It can be there somewhere and that
17 this isn't just that you know, you had a blowup or
18 you had an argument or you decided to get divorced
19 and you did something; and, gosh, you feel bad
20 about it.

21 You've been doing this and doing this
22 and doing this. And you've been saying that this is
23 the purpose that you had for it, that you were going
24 to ruin her life.

25 And the fact that you would do something

1 in addition to pictures, which is horrible, but that
2 you would also buy domain names in the name of your
3 former wife, sounds like to me a person that's
4 planning to do some stuff in the future.

5 So I can't prohibit you from posting
6 bail, but I -- I would be very concerned about a
7 situation where -- and here's the thing, is even if
8 you're not physically near her, it -- you're
9 obviously really good at computers. That's the kind
10 of work that you do.

11 You could probably do stuff right under
12 your mom's nose and she wouldn't even realize, grab a
13 phone or something. So I'm going to raise it 250,000
14 and you can post ten percent of that.

15 If you do post ten percent of that, even
16 then I would want you to be under a strict release
17 agreement and I would adopt if that happened all of
18 the conditions recommended by our Release Office.
19 And I believe that they're addressed also in the
20 State's motion.

21 And I know you've conceded those issues
22 if we get to that point in terms of you know, no --
23 no contact, computers, et cetera. But I have no
24 doubt that your attorney, because I know him to be
25 very thorough, has had a gone-to-the-woodshed type of

1 talk with you about this.

2 But I just want you to hear it from me,
3 too. Whatever's going to happen with this case, if
4 you decide to have a trial, then you're presumed to
5 be innocent and that's just fine with me, but I've
6 got to make the decisions on what's in front of me
7 now and this is extremely concerning, okay?

8 So my rulings will so reflect and let me
9 sign this and then you can fill that out.

10 And, Ms. Larson, is there anything else
11 that I need to address between what you have
12 recommended and what the State's criteria is?

13 MS. LARSON: No.

14 THE COURT: Thank you very much. So
15 then that's all we're going to do.

16 Thank you, Mr. Taylor.

17 MR. TAYLOR: Thank you, Judge.

18 THE COURT: And Ms. Atwood.

19 MS. ATWOOD: Thank you, Judge.

20 * * *

21 (Court adjourned, Volume 1, 8-9-16 at 2:00 p.m.)
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23
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REPORTER'S CERTIFICATE

I, Katie Bradford, Court Reporter of the Circuit Court of the State of Oregon, Twentieth Judicial District, certify that I transcribed in stenotype from a digital audio recording the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE SUZANNE M. UPTON, on **August 9, 2016**;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, **Volume 1 of 5, Pages 1 through 19**, both inclusive, constitutes a full, true and accurate record of said proceedings taken from a digital audio recording and so reported by me in stenotype as aforesaid.

Witness my hand and CSR Seal at
Portland, Oregon, this 11th day of January, 2017.

Katie Bradford, CSR 90-0148
Court Reporter
CSR Expires: 9-30-17
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